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No. 88-

SUPREME COURT, U.S.
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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1988

MICHAEL T. MALONEY,
Petitioner

v.

THOMAS J. LANIGAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in view of this Court's decisions in Rose v. Clark, 478 U.S. 570 (1985), and Pope v. Illinois, 107 S.Ct. 1918 (1987), that allegedly defective jury instructions on the prosecution's burden of proof can be harmless error, this Court should allow the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit holding, in a case where the evidence against the defendant was overwhelming and the defendant presented no defense, that alleged errors in a jury instruction on the state's burden of proof beyond a reasonable doubt could not be harmless error.

2. Whether, in view of the direct conflict between the decision of the

United States Court of Appeals for the First Circuit that alleged errors in jury instructions on the state's burden of proof beyond a reasonable doubt cannot be harmless, and a decision of the Massachusetts Supreme Judicial Court that such errors can be harmless; and in view of the correlative conflict between the decisions of the United States Court of Appeals for the First Circuit that a trial court need not define the concept of "reasonable doubt" and should not use the language "moral certainty," and the decisions of the Massachusetts appellate courts that the trial court must define the concept of "reasonable doubt" and should use the language "moral certainty"; this Court should allow the petition for a writ of certiorari to eliminate the problems which eventuate from those conflicts in the course of

federal habeas review of state court convictions.

3. Whether in the instant case the state court judge's instruction as a whole conveyed the meaning of "beyond a reasonable doubt," where he defined the concept in terms of moral certainty, contrasted the criminal and civil standards of proof, and explained what reasonable doubt was not; and whether, in reviewing the challenged instruction on collateral attack, the federal court applied too strict a standard of review.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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The petitioner, Michael T. Maloney, hereby petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, Lanigan v. Maloney, Nos. 88-1200 and 88-1424, is published at 853 F.2d 40 (1st Cir. 1988). It is reproduced here as Appendix A. The opinion of the United States District Court, District of Massachusetts, Civil Action No. 86-3128-S (D. Mass. Jan. 26. 1988) is not published. It is reproduced here as Appendix B. The opinion of the Massachusetts Appeals Court in the underlying criminal case, Commonwealth v. Lanigan, is published at 12 Mass. App. Ct. 913, 423 N.E.2d 800 (1981). It is reproduced as Appendix C. The Massachusetts Supreme Judicial Court, without opinion, denied further appellate review of the decision of the Massachusetts Appeals Court, 384 Mass. 817 (1982).

JURISDICTION

The decision below was issued on August 9, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV provides, in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

The respondent Lanigan ("the respondent") was convicted in the Superior Court Department of the Trial Court of Massachusetts of armed robbery, assault with intent to murder, assault and battery by means of a dangerous weapon, and kidnapping. The Massachusetts Appeals Court affirmed the conviction, Commonwealth v. Lanigan, 12

Mass. App. Ct. 913, 423 N.E.2d 800 (1981). The Massachusetts Supreme Judicial Court denied further appellate review, Commonwealth v. Lanigan, 384 Mass. 817 (1982). The United States District Court for the District of Massachusetts allowed the respondent's petition for a writ of habeas corpus. Appendix B. The United States Court of Appeals for the First Circuit affirmed the order allowing the writ. Lanigan v. Maloney, 853 F.2d 40 (1st Cir. 1988).

The facts proved at trial were as follows. At approximately 2:00 p.m. on February 4, 1978, Patricia Maynard, who lived on Parker Street across from Rix's Salon, a bar in Gardner, was inside her apartment with Rene Bastarache, four named others, and "Tom" whose last name she had forgotten but whom she identified as the respondent at trial. (Tr.

130-131).[1/] The respondent had a black-handled knife on his belt. (Tr. 131). When one of the men, Dunphy, took the respondent's knife, the respondent told him he was going to use it. The respondent said he was going out drinking at Rix's (Tr. 138) and stabbing. (Tr. 132).

At approximately 10:30 or 11:00 p.m. that night, the victim, Neil Hirons, went to Rix's Salon. (Tr. 45). The victim had three or four drinks, talked with a friend and left at about 1:00 a.m. (Tr. 46-47). As the victim left the bar, he saw one man on his right and another on his left. The street was lit by street lights (Tr. 47) and the victim had no

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1/ References to the trial transcript are denoted ("Tr. [page]"). The entire two-volume transcript was introduced in the District Court and was included in the Record Appendix in the Court of Appeals.

problem identifying people or objects on the sidewalk. (Tr. 99). The two men approached the victim from behind and one of the two, the respondent, told the victim to go to a building located across the street and a block away. (Tr. 48). The victim recognized both the respondent, who had come uninvited to the victim's home the previous Thursday (Tr. 48-49, 88) and the second man, Rene Bastarache, who had lived near the victim's parents' furniture store and who had worked for them. (Tr. 48).

Flanked by these two individuals he had recognized, the victim crossed the street to the building. The respondent and Bastarache told the victim to go inside and upstairs and he did (Tr. 50-51). The respondent directed the victim to walk about fifty feet down a hallway and opened a door to an

apartment. Bastarache entered and exited. (Tr. 52). The respondent opened the door to another apartment. (Id.). At that point the victim noticed that the respondent was holding a black knife with a four to six-inch blade. (Id.)

The respondent pointed the knife at the victim's throat and ordered him to sit in a chair. (Tr. 53). Bastarache was also standing in the room. (Tr. 55). The respondent told the victim to give him his wallet and whatever was in his pockets. (Tr. 57). The victim complied, giving the respondent four checks, about $70.00 in cash, and credit cards. (Tr. 57). The respondent also took the victim's car keys from the victim's pocket, handed them to Bastarache, and told Bastarache to start the car. (Tr. 58). The respondent counted the money and gave some to

Bastarache. (Tr. 58). Evidently, the respondent kept more than he gave; Bastarache complained, "That's not fair." (Tr. 58).

The respondent put his share of the money in his pocket and looked at the checks. (Tr. 59). The respondent took a pen off the kitchen table and told the victim to sign the checks. (Id.). The victim told the respondent he could not sign the checks because they were business checks belonging to his father. (Id.) The respondent then punched the victim in the nose and told him to sign them anyway, but the victim was too nervous to write his name. (Id.) The respondent tried to copy, and practiced forging, the victim's name from his credit cards. (Tr. 60). The respondent ultimately crumbled the checks, handed them to the victim, and told the victim

to eat them. (Tr. 59). The victim started to eat the checks but could not swallow them. (Id.).

Meanwhile, Bastarache returned and said he could not start the car. (Tr. 60). The respondent told him to try again. (Id.). The respondent then took the checks into the bathroom and tried to flush them down the toilet. (Tr. 61). When he returned from the bathroom, the respondent told the victim to stand up and take his clothes off; the victim complied, then sat down. (Tr. 61). As the victim was removing his clothes, the respondent kept a knife trained on him, pointed at this throat. (Id.).

The respondent told the victim to go into the bathroom. Inside the bathroom, the respondent tried to tie the victim's hands with a black electrical cord. (Tr. 61). When the respondent walked out, the

victim was able to pull the cord loose but remained in the bathroom. (Tr. 62). The respondent returned to the bathroom and told the victim to go back and lie on the bed. The respondent then tried to tie the victim's hands to his feet with the cord. (Tr. 62). The respondent put the knife to the victim's back, cut his shoulder, and asked him how it felt. (Id.). Then the respondent told him to sit in the chair. (Id.).

While the victim sat and listened, the respondent and Bastarache, who had returned to the apartment, discussed whether they should kill him. (Tr. 63). The respondent taunted the victim that he was a "pretty big boy" and asked him why he didn't "take [them] both on." (Id.). At some point, both the respondent and Bastarache put down the knives they had been holding. (Id.). The victim jumped

up and grabbed Bastarache so that the respondent, who had picked up his knife, could not stab him. (Tr. 63-64). The respondent, trying to move around Bastarache, stabbed the victim with the knife. (Tr. 64).

The respondent then told the victim to put on some clothes which were lying on the floor, and which did not belong to the victim. Bastarache had taken the victim's jacket. The victim put on the pants from the floor (which were too small for him) and boots. (Tr. 65). The respondent continued to hold a knife to the victim. (Tr. 66). Then the respondent picked up the victim's clothes, put them in the shower, and wet them. (Id.).

The respondent said to Bastarache, "We'll take him downstairs and make him start the car, if he gets it started we'll kill him there, if he doesn't ...

we'll take him back up the stairs and kill him in the apartment." (Id.). Holding a knife to the victim's stomach, the respondent walked out the door in front of him; Bastarache stood behind him. (Id.). They all went out and crossed the street to the car. (Id.). The respondent entered the passenger side and Bastarache, who was holding a knife to the victim's stomach, told the victim to get into the car. The victim complied. (Tr. 66-67). The respondent told the victim to start the car. Although he knew the car would not start unless he pulled out the choke, the victim did not pull it out. (Tr. 67). As a result, the car failed to start. They all got out of the car and re-crossed the street, with both the respondent and Bastarache holding the knives at the victim's throat. (Id.).

As they went upstairs, the respondent said to Bastarache, "We'll take him down the hallway and kill him in the apartment." (Id.). The victim then started pushing and striking them. (Tr. 68). The respondent reached around Bastarache and stabbed the victim twice in the stomach. (Id.). The respondent fell. The victim hit Bastarache and then he broke a window to create some noise. (Id.). The victim then ran down the fire escape. (Tr. 69). The victim looked up to see where the respondent and Bastarache were in relation to where he was. (Id.). Although there was no police officer in sight, the victim yelled, "officer there standing by the alley" and the respondent and Bastarache ran away. (Tr. 70). The victim walked up Parker Street toward the center of town, turned right toward the police

station, and, stumbling, met a cruiser. (Tr. 73). He was taken to the Henry Heywood Memorial Hospital, was treated for stab wounds to the abdomen, chest, legs and side, and stayed a week. (Tr. 74). During his stay, he gave a statement to Officers Swelina and Fournier. (Tr. 84, 85).

The day after the victim was admitted to the hospital, Sunday, February 5, 1978, Officer Casavanth participated in the investigation of the Parker Street incident. After talking with Officers Swelina and Fournier, he went to the third floor at 65 Parker Street. (Tr. 139-140). He observed a broken window and what appeared to be blood in the hallway, at the exit to the fire escape, on the door casing and handle (Tr. 140-141). He also saw blood on the snow outside the building. (Tr. 142).

Casavanth located the manager of the building who opened the door to the apartment 28 with a passkey. (Tr. 144). Inside the apartment, Casavanth saw two knives and what appeared to be blood on the floor. (Tr. 145). At the foot of the bed he found an electrical cord with a loop tied at each end. (Tr. 147). He also found wet clothes (Tr. 148); a piece of paper with the victim's name written on it three times (id.); papers, business cards and a credit card on the table (Tr. 150); and a checkbook containing checks imprinted with the respondent's name and address on the dresser. (Tr. 150-151).

The investigation focused on the respondent. Casavanth began looking for the respondent and Bastarache. (Tr. 152). The respondent was brought back from Idaho over a year later, in the fall of 1979. (Tr. 153-154).

After the Commonwealth rested, the respondent rested without presenting any evidence. (Tr. 159). The respondent's closing argument was, in pertinent part:

> I don't know what happened. You don't know what happened exactly. We have [the victim's] testimony. We have the officer's testimony. We have the girls[']testimony. I submit somewhere in there are the actual facts. You are the fact finders. I do submit, I think there is enough evidence to indicate what happened is not what Mr. Hirons said happened. There was a fight. He was stabbed twice on the stairs, but not what he said it was. In the apartment something else happened, what it was I don't know, the facts of marijuana and booze you can draw your own inferences from that and see what happened in there. (Tr. 177).

At trial, the respondent requested a reasonable doubt instruction in the language of Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 320 (1850). 2/

2/ The Court of Appeals for the First Circuit characterized the Webster instruction as "a long-standing formulation repeatedly approved by the Massachusetts Supreme Judicial Court." Appendix A, at p. 3.

He did not request a self-defense instruction.

The Court, McCooey, D.C.J., instructed the jury on reasonable doubt as follows:

> You have sat throughout the month in automobile accidents, products liability, defects in automobile manufacturers, Ford, Chrysler, General Motors, defects in machinery, defective parts of machinery, fall downs on snow and ice, breach of contract. What are all those cases? Their [sic] Civil cases. They don't belong in this session. This is a Criminal session not a Civil session and the only reason I make any reference at all to the Civil session is in contradistinction to the Criminal session, which this is, is to emphasize to you burden of proof in our blessed and wonderful country, who is accused of a crime, that's all Lanigan is. He was arrested, he may have been indicted, he may have been charged, he may have been accused, he stands accused of a crime. A complaint on the fourth floor, the District Court, an indictment of this the second floor, the felony session. What are they? Pieces of paper that are accusations that's all until a jury determines the guilt or the innocence of the party, So remember the mere fact a person is arrested or a person -- you read in the paper that somebody the Grand

Jury has indicted them for probable cause in crime remember their guilt is nothing at that point, until such time in our blessed country as their guilt is proven by a Criminal jury, such as you are, beyond a reasonable doubt and I am going to give you in a minute what I consider the best case that ever came down in the state as to what is meant by proof beyond a reasonable doubt by Judge Lummus a Judge in another day and time, long departed.

Now, on the Civil side of the Court, which this is not, automobile accidents, product liability, fall down on snow and ice. On the Civil side of the Court before you award anybody a quarter, two things they have to prove to your satisfaction. What would they be? Number one: Liability, blame, culpability, responsibility, fault, negligence, for the happening of, the occurrence of the accident, or the incident, with resulting injuries. Number two: They have to prove that the injury was directly related to the happening of the accident. That's the Civil side of the Court.

What's the burden of proof there? Well, you have all seen it, ladies and gentlemen, there isn't a man or woman here who at sometime in your life time haven't seen a picture of the female goddess of justice, or remember a statue or picture. She stands before you blindfolded, indifferent, indifferent to prejudice, indifferent to bias, indifferent to anything in the nature

of emotional appeal, but she particularly stands before you with what? The scales of justice in her arms. And there, on the Civil side of the Court, which this is not, those scales of justice must be tilted on liability and on damages, both of them, by a fair preponderance of the evidence, before you award to any plaintiff. That's the Civil side of the Court.

Now, I come to the Criminal side of the Court, that's what were [sic] on today, the Criminal side of the Court. This young man is accused of four crimes and he stands accused, indicted, he is charged with four crimes. The burden here is not to prove his guilt by a fair preponderance of the believable evidence, tilting the scales slightly in his favor. The burden here, Mr. Foreman and ladies and gentlemen of this jury is to prove his guilt beyond a reasonable doubt. On the Criminal side of the Court, which this is, a criminal, one who is charged with a crime I should say, not a criminal -- who is charged with a crime -- his guilt must be established beyond a realm of speculation, guess work, surmise. That sort of thing must be established how? Beyond a reasonable doubt. Meaning what? Meaning beyond all doubt? Never, because it's impossible in our society to prove anybody guilty of a crime beyond all doubt. That would be to [sic] lofty a standard, it would be unattainable. But the standard is proof beyond a reasonable doubt. Meaning what? That proof to a degree of

> moral certainty. Meaning what? That proof to a degree of moral certainty. Meaning what? That the 12 of you good people, the jury will be reduced from 14 to 12 by the clerk, 12 of you good people invoke and calling upon your good God given common sense and basically weight and evaluate, recreate the evidence, you are going to ask yourselves are we satisfied, how? To a degree of moral certainty not beyond an absolute doubt that the accused did commit the crime, or the crimes of which he stands accused before us. That's your issue, that's your job, that's what your [sic] here for today. It is not my job, it's not any of the judges [sic] job.

Appendix A, at pp. 24-27.

Defense counsel objected generally to the judge's failure to instruct the jury in accordance with his request for a Webster instruction. (Tr. 209). He made a "skeletal objection," saying simply, "Commonwealth versus Webster in my instructions." Appendix A, at p. 9. On appeal to the Massachusetts Appeals Court, the respondent argued that the language in the judge's instruction was

proper, but that it did not go far enough. See Appendix C, at p. 15. The Massachusetts Appeals Court ruled that the charge "passed muster, although the question is close." Commonwealth v. Lanigan, 12 Mass. App. Ct. 913, 914, 423 N.E.2d 800, 802 (1981), Appendix C, at p. 4. The Supreme Judicial Court denied further appellate review, Commonwealth v. Lanigan, 384 Mass. 817 (1982).

In October, 1986, the respondent filed the instant petition for a writ of habeas corpus, 28 U.S.C. §2254, claiming that the reasonable doubt instruction was constitutionally defective. As the Court of Appeals for the First Circuit summarized his claims:

> . . . [H]e challenged the reasonable doubt instruction on three grounds. First, he complained that the judge twice equated proof beyond a reasonable doubt with 'proof to a degree of moral certainty,' allowing the jurors to find guilt even if they were substantially less than morally sure of their conclusion. Second, the judge contrasted the criminal

> standard of proof beyond a reasonable doubt with the civil standard of preponderance of the evidence in a way that [he] claims was confusing. Finally, [he] claimed that the reasonable doubt instruction was unbalanced in that 'it heavily emphasized why the burden of proof could not be too vigorous, but failed to explain at all why it was important that the burden be as vigorous as it was.'

Appendix A, at p. 4.

The federal District Court held that as a result of these defects there was a "significant possibility" the jurors had no clear sense what degree of certainty was required to convict the respondent and thus his due process rights were violated. Appendix B, at p. 10. The District Court granted the writ, and the petitioner (the Commonwealth) appealed.

Rejecting the petitioner's arguments that the harmless error rule announced in Chapman v. California, 386 U.S. 18 (1967), and extended by Rose v. Clark,

478 U.S. 570 (1986), applied to alleged errors in a jury instruction on reasonable doubt, and that, in this case, the evidence was so overwhelming that the error was harmless, the United States Court of Appeals for the First Circuit affirmed the order of the District Court allowing the writ of habeas corpus. Appendix A, at pp. 36-46.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. The Petition For A Writ Of Certiorari Should Be Granted Because, Contrary to the Decisions of This Court, The Court Of Appeals For the First Circuit Ruled That The Chapman Harmless Error Rule Did Not Apply To An Alleged Error in Jury Instructions On The Prosecution's Burden of Proof Beyond a Reasonable Doubt.

Contrary to Pope v. Illinois, 107 S.Ct. 1918, 1922 (1987), the Court of Appeals for the First Circuit in its decision below, "continued to have serious doubts whether a conviction

obtained without a proper reasonable doubt instruction could ever be upheld"; understood Rose v. Clark, 478 U.S. 570 (1986) "to imply that another error that might well trigger automatic reversal of a conviction is the absence of a proper reasonable doubt instruction"; and held that the harmless error analysis did not apply to an alleged error in a jury instruction on the state's burden of proof beyond a reasonable doubt. Appendix A, at pp. 37-44. 3/

3/ The Court of Appeals for the First Circuit explicitly ruled that a conviction obtained without a proper reasonable doubt instruction could not be upheld, and that it understood this Court in Rose to imply that an error in an instruction on reasonable doubt might trigger automatic reversal. See Appendix A, at pp. 37, 45-46. Stating that it was "express[ing] no opinion on the matter," the Court of Appeals added that it was "arguable that there will be some case in which the evidence is so compelling that no reasonable person possibly could reach a verdict of innocence. Perhaps this would be so if the government introduces a voluntary confession that is not

(footnote continued)

Since this Court decided Chapman v. California, 386 U.S. 18 (1967), it has

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(footnote continued)

challenged at trial by the defendant . . . But in this instance, where the Commonwealth's case rested substantially on the credibility of the alleged victim, [the Court] [could not] say that the errors in the reasonable doubt instruction were harmless beyond a reasonable doubt." Id. In addition to making a determination that the harmless error rule does apply to alleged errors in the instruction on reasonable doubt, this Court may revisit the issue whether, in this case, the alleged error was harmless in light of the overwhelming nature of the evidence. The determination whether the evidence was overwhelming is a question of federal constitutional law subject to review de novo by this Court. United States v. Hasting, 461 U.S. 499, 510 (1982), citing, inter alia, Harrington v. California, 395 U.S. 250, 254 (1969) and Chapman, 386 U.S. at 24-26. See also Rushen v. Spain, 464 U.S. 114, 120 (per curiam) (1983); Herd v. Kincheloe, 800 F.2d 1526, 1528 (9th Cir. 1986) (ultimate question whether Sandstrom error was harmless was subject to de novo review); McKenzie v. Risley, 842 F.2d 1525 (9th Cir. 1988) (same); 28 U.S.C. §2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.")

"'repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.' Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986)." Rose v. Clark, 478 U.S. 570, 576 (1985). The Court has applied the harmless error principle generally to a variety of constitutional errors. See, e.g., Van Arsdall, 475 U.S. at 684 (failure to permit cross-examination of witness); United States v. Hasting, 461 U.S. 499, 508-509 (1983) (improper comment by prosecutor on defendant's failure to testify); Milton v. Wainwright, 407 U.S. 371, 377 (1972) (improper admission of confession obtained in violation of right to

counsel); Rushen v. Spain, 464 U.S. 114, 118 (1983) (per curiam) (violation of defendant's right to be present at trial); Harrington v. California, 395 U.S. 250, 254 (1969) (admission of non-testifying co-defendant's statement).

Specifically, the Court has applied the harmless error principle to alleged errors in jury instructions. See Rose, 478 U.S. at 576 (Chapman harmless error rule applied to jury instructions which inproperly shifted the burden of proof on the issue of malice); Connecticut v. Johnson, 460 U.S. 73, 87 (1982) (Sandstrom error may be harmless if the defendant conceded issue of intent). Indeed, "while there are some errors to which Chapman does not apply, they are the exception and not the rule. Accordingly, if the defendant had counsel and was tried by an impartial

adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." Rose, 478 U.S. at 579 [citation omitted];[4/] see also Pope v. Illinois, 107 S.Ct. 1918, 1922 (1987).

"To the extent that cases prior to Rose,[5/] may indicate that a conviction can never stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof, see, e.g., Cabana v. Bullock, 474 U.S. 376, 384, 106

4/ In Rose, 478 U.S. at 578 n.6, the Court gave the following examples of errors which would not be harmless: use of coerced confession, Payne v. Arkansas, 356 U.S. 560 (1958); denial of counsel, Gideon v. Wainwright, 372 U.S. 335 (1963); and biased adjudication, Tumey v. Ohio, 273 U.S. 510 (1927).

5/ Rose v. Clark, 478 U.S. at 579.

S.Ct. 689, ____, 88 L.Ed.2d 704 (1986), after Rose, they are no longer good authority." Pope v. Illinois, 107 S.Ct. at 1922 n. 7. Thus the suggestion in dictum in Jackson v. Virginia, 443 U.S. 307, 320 n. 14 (1979) and United Brotherhood of Carpenters and Joiners of America v. United States, 330 U.S. 395, 410 (1947) to the effect that the failure to instruct a jury on the "beyond a reasonable doubt" standard cannot be harmless, is no longer good authority.

Rather, after Rose, 485 U.S. at 579 and Pope, 107 S.Ct. at 1922, the harmless error principle must be applied to allegedly deficient instructions on reasonable doubt. There is no reason to draw a distinction between instructions which allegedly shift the burden of proof and instructions which allegedly dilute the burden of proof, particularly in a

case where, in view of the uncontested or overwhelming evidence, the reviewing court can determine for itself that "the facts found by the jury were such that it is clear beyond a reasonable doubt that if the jury had never heard the impermissible instruction its verdict would have been the same." Pope, 107 S.Ct. at 1922. See also United States v. Hasting, 461 U.S. at 510-511 ("The question a reviewing court must ask is this: absent the prosecutor's allusion to the failure of the defense to proffer evidence to rebut the testimony of the victims, is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?").

In this case, it is clear beyond a reasonable doubt that even with a more thorough instruction on "beyond a reasonable doubt," the jury would have

reached a guilty verdict. As summarized above, the evidence was overwhelming. Indeed, as noted, the prosecution's evidence aside, the respondent conceded that he was present (Tr. 166); that there was a fight (Tr. 169); that "something happened" (Tr. 173); that the victim knew him (Tr. 173); and that the victim was stabbed twice. (Tr. 175). As also noted above, Lanigan presented no defense and he did not testify. (Tr. 159). Thus, the victim's testimony was uncontradicted. In short, the sheer weight of the Commonwealth's evidence, coupled with the absence of any alternative version of the facts tendered by the respondent, assured that any error in the trial court's instruction was harmless beyond a reasonable doubt.

II. The Petition For A Writ Of Certiorari Should Be Granted Because Of The Facial Conflict Squarely Confronted in Federal Habeas Review of State Convictions Between the Decision of the Court of Appeals For The First Circuit That An Alleged Error In Jury Instructions On The State's Burden Of Proof Beyond A Reasonable Doubt Cannot Be Harmless Error and That Of The Massachusetts Supreme Judicial Court That Such An Error Can Be Harmless.

There is a direct conflict between the decisions of the state and federal courts on the issue whether the harmless error analysis applies to alleged errors in jury instructions on reasonable doubt. This conflict is unavoidably confronted when the federal court reviews state court convictions on habeas review.

In Commonwealth v. Garcia, 379 Mass. 422, 442, 399 N.E.2d 460, 472-73 (1980), the Massachusetts Supreme Judicial Court held that an error in the trial court's reasonable doubt charge was harmless in light of the "overwhelming evidence of

guilt." In the instant case, however, the Court of Appeals for the First Circuit, however, in the instant case "disagree[d] with the SJC's conclusion" that an error in the reasonable doubt charge could ever be harmless. Lanigan, 835 F.2d at 50 n.8; Appendix A, at p. 44. Thus, the petition for a writ of certiorari should be granted pursuant to S.Ct. R. 17.1(a) because the Court of Appeals for the First Circuit has decided a federal question in a manner which conflicts with a state court of last resort.

The direct conflict between the decision of the Court of Appeals for the First Circuit that the harmless error analysis does not apply to alleged errors on the burden of proof beyond a reasonable doubt and the state Supreme Judicial Court's view that it does, is compounded by the fact that prior to its

decision in Lanigan, the Court of Appeals for the First Circuit had noted that "[i]t can be said beyond any doubt that the words 'reasonable doubt' do not lend themselves to accurate definition[,]" United States v. Gibson, 726 F.2d 869, 874 (1st Cir.), cert. denied, 466 U.S. 960 (1984), and had joined a growing number of appellate courts in approving a reasonable doubt instruction in which the term "reasonable doubt" is not defined at all. United States v. Olmstead, 832 F.2d 642, 646 (1st Cir. 1987) cert. denied, 108 S. Ct. 1739 (1988); United States v. Littlefield, 840 F.2d 143, 146 (1st Cir. 1988). See Murphy v. Holland, 776 F.2d 470, 475 (4th Cir. 1985) ("the wisest course for trial courts to take is to avoid defining reasonable doubt in their instructions unless specifically requested to do so by the jury"), vacated

on other grounds, 475 U.S. 1138 (1986); United States v. Lawson, 507 F.2d 443, 441-43 (7th Cir. 1974) (defining reasonable doubt is optional with trial judge), cert. denied, 420 U.S. 1004 (1975); United States v. Witt, 648 F.2d 608, 610-11 (9th Cir. 1981) (same).

Moreover, prior to its decision in Lanigan that the judge's definition of reasonable doubt in terms of "moral certainty" and "to a degree of moral certainty" was constitutionally defective, the Court of Appeals for the First Circuit had condemned the practice of defining reasonable doubt in terms of "moral certainty."[6/]

6/ The court, however, had not found the use of the phrase to be constitutional error. See, e.g., United States v. Drake, 673 F.2d 15, 21 (1st Cir. 1982); United States v. Indorato, 628 F.2d 711, 720-21 (1st Cir. 1980); United States v. Ariza-Ibarra, 605 F.2d 1216, 1228 (1st Cir. 1979); United States v. DeVincent, 632 F.2d 147, 153 (1st Cir. 1980).

United States v. Del Toro Soto, 676 F.2d 13, 17 (1st Cir. 1982); United States v. DeWolf, 696 F.2d 1, 4 (1st Cir. 1982).

The decisions of the Court of Appeals for the First Circuit in this regard directly conflict with the decisions of the state's highest court. In contrast to the aforementioned federal decisions which encourage the trial judge not to define reasonable doubt, Olmstead, 832 F.2d at 646, and condemn the use of the term "moral certainty" to define it, Del Toro Soto, 676 F.2d at 17, the Massachusetts state appellate courts not only require that a definition of reasonable doubt be given, Commonwealth v. Stellberger, 25 Mass. App. Ct. 148, 150, 515 N.E.2d 1207 (1987) (expressly rejecting Olmstead: "the necessity for a proper instruction on the meaning of reasonable doubt is a matter of state law which, in this area, requires more than

the First Circuit does"), but they also require that the concept of reasonable doubt be defined in terms of "moral certainty," first set out in Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 320 (1850). See Commonwealth v. Sheline, 391 Mass. 279, 293 n.4 (1984); Commonwealth v. Morse, 402 Mass. 735, 737 (1988); Commonwealth v. A Juvenile, 396 Mass. 215, 217-19 (1985); Commonwealth v. Tavares, 385 Mass. 140, 147-148, cert. denied, 457 U.S. 1137 (1982); Commonwealth v. Lanoue, 392 Mass. 583, 591 (1984), subsequent case history omitted; Commonwealth v. Spann, 383 Mass. 142, 150-151 (1981); Commonwealth v. Carballo, 381 Mass. 227, 229 (1980); Commonwealth v. Hughes, 380 Mass. 596, 600-601 (1980); Commonwealth v. Williams, 378 Mass. 217, 231-235 (1979); Commonwealth v. Seay, 376 Mass. 735, 745-746 (1978); Commonwealth v.

Smith, 381 Mass. 141, 146 (1980), subsequent case history omitted.

As Lanigan illustrates, this conflict between the federal and state courts is irreconcilable [7/] and irremediable without this Court's intervention. As the matter now stands, an instruction that is constitutionally sufficient as a matter of state law may be deficient as a matter of federal law; and an instruction that is constitutionally sufficient as a matter of federal law may be deficient as a matter of state law.

7/ At least one federal district court judge has found that such a conflict exists. In Smith v. Butler, No. 86-3273-WD, slip. op. at 9 (D. Mass. Sept. 23, 1988) (order denying petition for writ of habeas corpus), Judge Woodlock found that "[a] clear and unavoidable conflict exists between federal and state courts in Massachusetts over the use of the term 'moral certainty' in defining reasonable doubt."

III. The Reasonable Doubt Instruction Did Not "So Infect [...] The Entire Trial That The Resulting Conviction Violate[d] Due Process" Because The Emphasis On Moral Certainty, The Contrast To Civil Cases, And The Explanation Of What Reasonable Doubt Was Not, Adequately Conveyed The Meaning Of "Beyond A Reasonable Doubt."

The federal courts sitting on habeas review of the state court conviction in this case judged the instruction too harshly.[8/] Taken as a whole, the reasonable doubt instructions "conveyed

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8/ The Court of Appeals for the First Circuit agreed that its standard of review was "circumscribed because [the court was] reviewing a state criminal proceeding rather than a federal case" and that the proper standard of review was "whether the challenged aspects of the charge so infected the entire charge and trial as to cause the jury to evaluate petitioner's guilt or innocence under a standard less than 'beyond a reasonable doubt,' Bumpus v. Gunter, 635 F.2d 907, 909 (1st Cir. 1980)," but concluded that the challenged instructions "so infect[ed] the entire charge and trial." Lanigan, 835 F.2d 40, 48 n. 7 (1st Cir. 1988); Appendix A, at pp. 35-36.

the meaning established by law." Commonwealth v. Bumpus, 362 Mass. 672, 682, 290 N.E.2d 167, 175 (1972); Bumpus v. Gunter, 635 F.2d 907, 910 (1st Cir. 1980).

The use of the language "moral certainty" did not dilute the Commonwealth's burden of proof. The use of "moral certainty" language to explain reasonable doubt is a "proper definition of the Commonwealth's burden. Commonwealth v. Watkins, 377 Mass. 385, 388 (1979) . . . Indeed, emphasis on the necessity of moral certainty of guilt before convicting a defendant may overcome isolated inadequacies in an explanation of proof beyond a reasonable doubt. See Commonwealth v. Grace, 376 Mass. 499, 500-501 (1978)." Commonwealth v. Williams, 378 Mass. 217, 233, 391 N.E.2d 1202, 1212-1213 (1979). See also Commonwealth v. Smith, 381 Mass. 141, 146

(1980), subsequent case history omitted. In fact, the language of Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 320 (1850), which state law both sanctions and requires as a definition of "beyond a reasonable doubt," Commonwealth v. Stellberger, 25 Mass. App. Ct. 148 (1987), defines reasonable doubt in terms of moral certainty.[9/]

"Standing alone, [the "moral certainty"] language [did] not constitute plain error," United States v. Drake, 673 F.2d 15, 21 (1st Cir. 1982), let alone reach[ed] a "level of legal or

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9/ One federal district court judge has noted that "the use of 'moral certainty' as a means of defining proof beyond a reasonable doubt seems to have something approaching a talismanic effect in the Massachusetts state courts, saving otherwise problematic jury instructions from causing reversals of criminal convictions." Smith v. Butler, No. 86-3273-WD, slip. op. at 13 n. 9 (D. Mass. Sept. 23, 1988) (order denying petition for writ of habeas corpus).

constitutional error." United States v. Indorato, 628 F.2d 711, 720 (1980). This is particularly true in this case, where Lanigan did not specifically object at trial, Indorato, 673 F.2d at 21; the trial judge instructed the jury repeatedly that the Commonwealth had the burden of proof beyond a reasonable doubt, Tavares, 385 Mass. at 148, 430 N.E.2d at 1203; and he advised the jury that guilt must be established "beyond a realm of speculation, guess work, surmise. That sort of thing must be established . . . [b]eyond a reasonable doubt." (Tr. 192). Cf. Drake, 673 F.2d at 21 ("A defendant is never to be convicted upon mere suspicion or conjecture.").

The judge's isolated use of the phrase "to a degree of moral certainty" was at most a technical error that did not dilute the standard of proof or

amount to constitutional error. See Dunn v. Perrin, 570 F.2d 21, 25 (1st Cir.), cert. denied, 437 U.S. 910 (1978), citing Cupp v. Naughten, 414 U.S. 141, 147 (1973). The remainder of the charge made it clear how strict the standard of proof was. It must of course be presumed that the jury listened to the entire charge. "A reasonable juror can be expected to listen to all he/she is told by the judge and it will be presumed that he/she will not isolate a particular portion of the charge and ascribe to it more importance than the rest." McInerney v. Berman, 621 F.2d 20, 24 (1st Cir.), cert. denied, 449 U.S. 867 (1980).

The jury was repeatedly advised as to the correct burden of proof (six times: Tr. 190, 192, 193); was admonished to render an impartial verdict (See Tr. 191); and was informed throughout of the

solemnity of its responsibility. (Tr. 186-187, 207). Cf. Bumpus v. Gunter, 635 F.2d 907, 911 (1st Cir. 1980), cert. denied, 450 U.S. 1003 (1981). The judge's warning relative to the holding of the Commonwealth to too strict of a standard of proof was balanced by his instruction that Lanigan's guilt must be "established beyond a realm of speculation, guess work, surmise" (Tr. 192) and by his emphasis that the verdict must be based on the evidence presented at trial. (Tr. 193). Commonwealth v. Sheline, 391 Mass. 279, 296, 461 N.E.2d 1197, 1208-1209 (1984). His emphasis on the presumption of innocence (Tr. 193) also helped "to mitigate any negative effect of the judge's one-sided warning." Sheline, 391 Mass. at 296-297, 461 N.E.2d at 1209. The instruction also was devoid of any of the "strong

'emotional over-tones' of the [Commonwealth v.] Medeiros, [255 Mass. 304, 307 (1926)] rhetoric." Id. at 297, 461 N.E.2d at 1209.

"[T]he instruction did not advocate deviating from the reasonable doubt standard; it merely told why the government's burden was less than absolute." Bumpus, 635 F.2d at 911. In context, the instruction was "not a misformulation of the prosecution's burden of proof, but an attempt to explain reasonable doubt negatively." Commonwealth v. Williams, 378 Mass. 217, 234, 391 N.E.2d 1202, 1213 (1979). "Negative" definitions of the Commonwealth's burden of proof are not error or prejudicial error per se. Williams, 378 Mass. at 234, 391 N.E.2d at 1213; United States v. DeVincent, 632 F.2d 147, 153 (1st Cir. 1980). In this

case the negative instruction aided the jury to understand the standard of proof. "Conceptually, such proof is sufficiently metaphysical that it may be helpful to a jury to know what does not measure up to the standard if such instruction is accompanied by Webster language as to the active ingredients of the proof." Commonwealth v. Pires, 389 Mass. 657, 664, 451 N.E.2d 1155, 1160 (1983). "Defining something as 'not A, but B' is a familiar enough idiom not to be beyond the grasp of the average juror." DeVincent, 632 F.2d at 153.

The judge's contrast of the criminal and civil standards of proof also helped the jury understand the Commonwealth's burden of proof. Cf. Commonwealth v. Beverly, 389 Mass. 866, 872, 452 N.E.2d 1112, 1116 (1983) ("Language stating that proof beyond a reasonable doubt is not

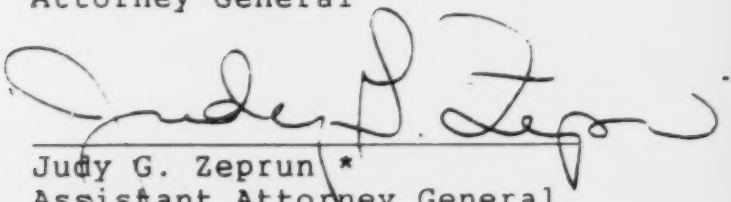
proof beyond a preponderance of the evidence . . . is unexceptional, although obviously the jury must be told much more."). The judge here repeatedly told the jury that he was contrasting the civil and criminal standards of proof and that they were sitting in a criminal session. (Tr. 190-192). As the state appellate court found, the differentiation, along with the emphasis on moral certainty and the caution against speculation, adequately explained the concept of reasonable doubt. Commonwealth v. Lanigan, 12 Mass. App. Ct. 913, 914-915, 423 N.E.2d 800, 802 (1981). There was no error, let alone constitutional error. Bumpus, 635 F.2d at 913.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit should be granted.

Respectfully submitted,

JAMES M. SHANNON
Attorney General



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4489J

UNITED STATES COURT OF APPEALS,
FIRST CIRCUIT

Nos. 88-1200, 88-1424

THOMAS J. LANIGAN,
Petitioner, Appellee,
v.
MICHAEL T. MALONEY,
Respondent, Appellant.

APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS
[Hon. Walter Jay Skinner,
U.S. District Judge]

Before
Coffin and Selya, Circuit Judges,
and Acosta,* District Judge.

Judy G. Zeprun, Assistant Attorney General, Criminal Bureau, with whom James M. Shannon, Attorney General, was on brief for respondent.

David J. Fine, by Appointment of the Court, with whom Silverglate, Gertner, Fine & Good was on brief for petitioner.

August 9, 1988

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*Of the District of Puerto Rico, sitting by designation.

APPENDIX A

COFFIN, Circuit Judge. The district court granted Thomas J. Lanigan's petition for a writ of habeas corpus on the ground that the instructions on reasonable doubt given at his criminal trial in Massachusetts state court were constitutionally defective. The Commonwealth appeals, claiming that the district court erred both on the merits and in failing to find that Lanigan's claim is procedurally barred. We have carefully considered the Commonwealth's arguments, but conclude that the district court properly found a redressible constitutional violation. We therefrom affirm.

I.

Petitioner Thomas J. Lanigan was convicted in Massachusetts of armed robbery, assault with intent to murder, assault and battery with a dangerous weapon and kidnapping. At trial,

petitioner specifically requested reasonable doubt instructions in the language of Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 320 (1850), a long-standing formulation repeatedly approved by the Massachusetts Supreme Judicial Court. Petitioner objected to the trial judge's failure to conform to the Webster charge, and later challenged the instruction on appeal.

The Massachusetts Appeals Court reversed the two assault convictions because of problems with the jury instructions on those particular crimes, but affirmed the convictions for armed robbery and kidnapping. The court found that the reasonable doubt charge "passed muster . . . , although the question is close." Commonwealth v. Lanigan, 12 Mass. App. Ct. 913, 915 N.E.2d 800, 802 (1981). The Supreme Judicial Court

denied Lanigan's petition for further appellate review.

In his petition for a writ of habeas corpus, Lanigan challenged the reasonable doubt instruction on three grounds. First, he complained that the judge twice equated proof beyond a reasonable doubt with "proof to a degree of moral certainty," allowing the jurors to find guilt even if they were substantially less than morally sure of their conclusion. Second, the judge contrasted the criminal standard of proof beyond a reasonable doubt with the civil standard of preponderance of the evidence in a way that petitioner claims was confusing. Finally, petitioner claimed that the reasonable doubt instruction was unbalanced in that "it heavily emphasized why the burden of proof could not be too rigorous, but failed to explain at all why it was

important that the burden be as rigorous as it was."

The district court held that as a result of these defects "there is a significant possibility that the jurors in this case entered the jury room with no clear sense of what degree of certainty was required in order to convict the defendant," thus "'obfuscat[ing] one of the "essentials of due process and fair treatment,"'" District Court opinion at 6 (quoting Dunn v. Perrin, 570 F.2d 21, 25 (1st Cir. 1978) (quoting In re Winship, 397 U.S. 358, 359 (1969)). The court therefore granted Lanigan's petition for a writ of habeas corpus.

On appeal, the Commonwealth argues first that petitioner's claim is procedurally barred because he failed at trial to make the three specific objections to the charge that he now

makes in his habeas corpus petition. The Commonwealth argues secondly that the reasonable doubt instruction adequately conveyed the meaning of "beyond a reasonable doubt." Finally, the Commonwealth argues that even if there was error, it was harmless because of the overwhelming evidence against petitioner. We begin with the Commonwealth's procedural point.

II.

The Commonwealth argues that petitioner is in procedural default because his trial counsel's general objection that the reasonable doubt instruction did not follow the language of Commonwealth v. Webster was insufficient to comply with the Massachusetts rule that "where a party alleges error in a charge he must bring the alleged error to the attention of the judge in specific terms in order to

give the judge an opportunity to rectify the error, if any," Commonwealth v. McDuffee, 379 Mass. 353, 357 & n.3, 398 N.E.2d 463, 465 & n.3 (1979). See also Mass. R. Crim. P. 24(b) ("No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, specifying the matter to which he objects and the grounds of his objection.") Under Wainwright v. Sykes, 433 U.S. 72, 87 (1977), a defendant's failure to object at his state trial may constitute "an independent and adequate state procedural ground" sufficient to foreclose federal habeas corpus review if the state has a contemporaneous objection rule and has not waived its application. Puleio v. Vose, 830 F.2d 1197, 1199 (1st Cir. 1987). The Commonwealth argues that the Wainwright

doctrine bars federal review in this case.

The exhaustion doctrine, which the Commonwealth does not directly invoke,[1/] raises similar questions about whether we may entertain Lanigan's petition for a writ of habeas corpus. In general, the exhaustion doctrine requires that a state defendant seeking to overturn his conviction on federal grounds first must give the state courts "a fair opportunity" to consider his claims. Picard v. Connor, 404 U.S. 270, 276 (1971). This means that the habeas corpus petitioner must have presented the substance of his federal

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1/ The Commonwealth does not expressly claim that petitioner failed to exhaust his state remedies in state court, but in its brief it relies not only on cases discussing procedural default but also on cases and principles concerning exhaustion. We therefore believe it appropriate to consider both issues.

constitutional claim to the state appellate courts so that the state had the first chance to correct the claimed constitutional error.

We conclude that neither the Massachusetts contemporaneous objection rule nor the exhaustion doctrine bars federal review of Lanigan's claim. We shall address each in turn, beginning with the objection rule.

At the conclusion of the jury charge, petitioner's trial counsel said simply, "Commonwealth versus Webster in my instructions." This skeletal objection ordinarily might be dismissed as inadequate to preserve any issue connected with the charge. But in this instance, everyone, including the judge, clearly understood the reference to Commonwealth v. Webster as an objection to the reasonable doubt instruction. The Commonwealth does not dispute that

counsel's statement at the close of the charge sufficiently preserved an objection to the reasonable doubt charge; it claims only that the specific objections raised in federal court differed from those made in state court.

The problem we find in the Commonwealth's finely tuned argument is that, once we acknowledge that a cognizable objection has been made, we find it difficult to escape the conclusion that petitioner's demand was for the essence of the Webster charge, i.e., a balanced charge highlighting the high burden of proof. If such was the clear purport of the demand, we fail to see how petitioner's three present specifications of imbalance should not fairly be deemed covered by his more comprehensive objection.

In an effort to understand how much is conveyed both by the Webster charge

and by a simple objection to its not being given, we first dissect the Webster charge itself.[2/]

2/ Lanigan requested the following language:

"[A reasonable doubt] is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say the feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proven guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances; that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond a reasonable

(footnote continued)

In eight tightly constructed sentences, these points are made: the term "reasonable doubt" is not easily defined; it is not "mere possible doubt"; it exists when there is no "abiding conviction, to a moral certainty"; the burden of proof is on the prosecutor and all presumptions favor innocence; even a "strong" probability of guilt is not enough; evidence must establish guilt to a "reasonable and moral certainty" that "convinces . . . the understanding"; going beyond this would require absolute certainty and exclude circumstantial

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(footnote continued)

doubt; because if the law, which mostly depends upon considerations of a moral nature, should go further than this and require absolute certainty, it would exclude circumstantial evidence altogether."

This instruction is, with the exception of some punctuation and other minor changes, drawn verbatim from Webster, 59 Mass. at 320.

evidence. This passage takes no fewer than five approached to conveying the essence: (1) what is less than reasonable doubt; (2) where the burden lies; (3) whom the presumptions favor; (4) what kind of moral certainty amounts to reasonable doubt; (5) what is more than reasonable doubt. We find it hard to imagine, without recourse to prolixity, a charge more reflective of the solemn and rigorous standard intended.

In light of the care demonstrated in Webster, it is not surprising that the Supreme Judicial Court repeatedly has taken pains in recent opinions to endorse the century-and-a-quarter-old formulation. See, e.g., Commonwealth v. Ferreira, 373 N.E.2d 1264, 1273 n.12 (1977); Commonwealth v. Therrien, 371 Mass. 203, 209, 355 N.E.2d 913, 916-917 (1976); Commonwealth v. Gerald, 356

Mass. 386, 390, 252 N.E.2d 344, 347 (1969). Indeed, the Supreme Judicial Court specifically has encouraged Massachusetts trial judges to adhere to the "time-tested" Webster charge as a way of protecting against juror confusion over the meaning of the reasonable doubt standard. See, e.g., Therrien, 371 Mass. at 208-209, 355 N.E.2d at 916 ("freehand embellishments of the standard charge . . . can only create uncertainty and breed needless appeals").

This particular history of this seminal instruction persuades us that an objection noting generally the failure to charge in the language of Webster is entitled to be construed as protesting significant deviations from the sensitive balance in favor of a defendant achieved in that case. In essence, this history suggests that to say more is unnecessary; it is to be

expected that Massachusetts judges know the Webster charge, know what content is sought when it is requested, and know what omissions or assertions are contested when a lawyer objects to the failure to give the charge.

Moreover, in his brief to the state appeals court, petitioner obviously went beyond the content of his trial counsel's voiced objection by complaining, inter alia, that the concept of "moral certainty" was insufficiently explained. In giving serious consideration to petitioner's appeal, the Massachusetts Appeals Court implicitly accepted the objection made by petitioner's counsel as sufficient to preserve his more specific appellate claim. The Appeals Court apparently recognized that, although petitioner's argument had on appeal become more detailed, its substance had not

changed. We do not believe that the state court would consider the additional complaints about the reasonable doubt standard made in petitioner's habeas petition to be any less preserved.

In addition, we note that after petitioner's counsel objected to the reasonable doubt instruction, the trial judge expressed outright rejection of the Webster charge, stating his preference for formulations from cases that do not, in fact, exist.[3/] By

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3/ After petitioner objected, the trial judge stated:

> I didn't give for the record -- you will read the Commonwealth and Webster -- looking upon disfavor. The Commonwealth and Rodriguez I prefer to all the other cases, even including one I like, Commonwealth and Lummus.

The Commonwealth does not dispute petitioner's representation that there are no cases by the name of Commonwealth v. Rodriguez or Commonwealth v. Lummus that approve language for a reasonable doubt instruction. It appears that the trial judge was referring to Justice Henry Tilton Lummus, who sat on the Supreme Judicial Court from 1932 to 1955.

invoking preferred "authority" to which counsel obviously was unable to respond, the judge cut off counsel's protest at the point at which the lawyer could have been expected to elaborate on the inadequacies of the charge as given. In these circumstances, at least, we are confident that the Massachusetts courts would not interpose a technical barrier to petitioner's claim.

The exhaustion issue is even clearer. "[Petitioner] is not precluded from some reformulation of the claims [he] made in the state courts, since exhaustion requires only that 'the substance of a federal habeas corpus claim must first be presented to the state courts.'" Williams v. Holbrook, 691 F.2d 3, 6 (1st Cir. 1982) (quoting Picard v. Connor, 404 U.S. 270, 278 (1971)) (emphasis added in Williams). Thus, although the legal theory behind

the claim raised to the state and federal courts must be the same, "[t]his does not mean that the petitioner must have expressed the theory in precisely the same terms." Gagne v. Fair, 835 F.2d 6, 7 (1st Cir. 1987). See Picard v. Connor, 404 U.S. 270, 277 (1971) ("[T]here are instances in which 'the ultimate question for disposition' . . . will be the same despite variations in the legal theory or factual allegations urged in its support.")

The substance of Lanigan's claim has not changed; in both state and federal courts, he has argued that the reasonable doubt standard was not adequately conveyed to the jury and that the charge as given therefore trivialized the burden of proof needed to convict. The added detail in Lanigan's habeas corpus petition is precisely the sort of reformulation

anticipated and allowed by the courts. See Picard, 404 U.S. at 277 (challenging a confession based on psychological as well as physical coercion does not change the ultimate question before the court); Watkins v. Callahan, 724 F.2d 1038, 1041 (1st Cir. 1984) (federal claim that an evidentiary hearing should be held to determine who initiated certain conversations was adequately presented to state court, where petitioner argued that such statements should be suppressed per se). See also Daye v. Attorney General of the State of New York, 696 F.2d 186, 192 n.4 (2d Cir. 1982) (en banc) ("By the same legal 'basis' or 'doctrine,' we do not mean that there can be no substantial difference in the legal theory advanced to explain an alleged deviation from constitutional precepts. . . . A number of legal theories may be advanced

as to why a confession was not voluntary. Yet all that is needed to alert the state courts to the constitutional nature of the claim is the exposition of the material facts and the assertion that the confession was not voluntary.")

Some claims of constitutional violations -- such as ineffective assistance of counsel or unfair trial -- encompass an almost limitless range of possible errors. A defendant raising a Sixth Amendment violation who complained in state court about counsel's failure to object to certain testimony should not be deemed to have exhausted his or her remedies if the federal court claim asserts ineffective assistance of counsel based on a conflict of interest. In such a case, the state court's analysis of the alleged constitutional error necessarily would

differ substantially from the federal court's consideration of the Sixth Amendment claim. And the defendant's original argument would not have alerted the state court to the claim that formed the basis of the habeas corpus petition. See, e.g., Gagne v. Fair, 835 F.2d 6, 9 (1st Cir. 1987) (no exhaustion where state court claim of unfair trial based solely on prosecutor's comment vouching for credibility of witness, while habeas corpus petition claimed that such comment violated his constitutional rights in light of other comments and entire proceedings); Domaingue v. Butterworth, 641 F.2d 8, 12-13 (1st Cir. 1981) (no exhaustion where petitioner's ineffective assistance of counsel claim in state court based solely on trial counsel's failure to object to a self-defense instruction, while habeas corpus

petition attacked lawyer generally based on numerous occurrences not in state court record); Turner v. Fair, 617 F.2d 7, 11 (1st Cir. 1980) (petitioner argued new theory in federal court in support of Sixth Amendment confrontation claim, rendering state court analysis irrelevant).

In contrast, Lanigan's claim to both the state and federal courts depends upon resolution of the same question -- whether the language of the trial judge's instructions gave a clear sense of the degree of proof necessary to convict. This is unquestionably a case in which the difference in petitioner's arguments to the state and federal courts represented "a mere variation[] in the same claim rather than a different legal theory," Wilks v. Israel, 627 F.2d 32, 38 (7th Cir. 1980). Such a difference does not

preclude exhaustion. We therefore turn now to consider the merits of petitioner's claim.

III.

Although criminal defendants frequently challenge the content of the reasonable doubt instruction given at their trials, our experience has been that even imperfect formulations usually meet constitutional requirements when viewed in the context of the entire charge. See, e.g., United States v. Glantz, No. 87-1121, slip op. at 26-27 (1st Cir. May 16, 1988); United States v. Glenn, 828 F.2d 855, 861 (1st Cir. 1987); United States v. Munson, 819 F.2d 337, 345-46 (1st Cir. 1987); United States v. Drake, 673 F.2d 15, 21 (1st Cir. 1982); Bumpus v. Gunter, 635 F.2d 907, 909-913 (1st Cir. 1980). We therefore begin by reproducing the

court's entire reasonable doubt

instruction:

> You have sat throughout the month in automobile accidents, products liability, defects in automobile manufacturers, Ford, Chrysler, General Motors, defects in machinery, defective parts of machinery, fall downs on snow and ice, breach of contract. What are all those cases? They're Civil cases. They don't belong in this session. This is a Criminal session not a Civil session and the only reason I make any reference at all to the Civil session is in contradistinction to the Criminal session, which this is, is to emphasize to you burden of proof in our blessed and wonderful country, who is accused of a crime, that's all Lanigan is. He was arrested, he may have been indicted, he may have been charged, he may have been accused, he stands accused of a crime. A complaint on the fourth floor, the District Court, an indictment of this the second floor, the felony session. What are they? Pieces of paper that are accusations that's all until a jury determines the guilt or the innocence of the party. So remember the mere fact a person is arrested or a person -- you read in the paper that somebody the Grand Jury has indicted them for probable cause in crime -- remember their guilt is nothing at that point, until such time in our blessed country as their guilt is proven by a Criminal jury, such as

you are, beyond a reasonable doubt and I am going to give you in a minute what I consider the best case that ever came down in the state as to what is meant by proof beyond a reasonable doubt by Judge Lummus a Judge in another day and time, long departed.

Now, on the Civil side of the Court, which this is not, automobile accidents, product liability, fall down on snow and ice. On the Civil side of the Court before you award anybody a quarter, two things they have to prove to your satisfaction. What would they be? Number one: Liability, blame, culpability, responsibility, fault, negligence, for the happening of, the occurrence of the accident, or the incident, with resulting injuries. Number two: They have to prove that the injury was directly related to the happening of the accident. That's the Civil side of the Court.

What's the burden of proof there? Well, you have all seen it, ladies and gentlemen, there isn't a man or woman here who at sometime in your life time haven't seen a picture of the female goddess of justice, or remember a statue or picture. She stands before you blindfolded, indifferent, indifferent to prejudice, indifferent to bias, indifferent to anything in the nature of emotional appeal, but she particularly stands before you with what? The scales of justice in her arms. And there, on the Civil side of the Court, which

this is not, those scales of justice must be tilted on liability and on damages, both of them, by a fair preponderance of the evidence, before you award to any plaintiff. That's the Civil side of the Court.

Now, I come to the Criminal side of the Court, that's what we're on today, the Criminal side of the Court. This young man is accused of four crimes and he stands accused, indicted, he is charged with four crimes. The burden here is not to prove his guilt by a fair preponderance of the believable evidence, tilting the scales slightly in his favor. The burden here, Mr. Foreman and ladies and gentlemen of this jury is to prove his guilt beyond a reasonable doubt. On the Criminal side of the Court, which this is, a criminal, one who is charged with a crime I should say, not a criminal -- who is charged with a crime -- his guilt must be established beyond a realm of speculation, guess work, surmise. That sort of thing must be established how? Beyond a reasonable doubt. Meaning what? Meaning beyond all doubt? Never, because it's impossible in our society to prove anybody guilty of a crime beyond all doubt. That would be too lofty a standard, it would be unattainable. But the standard is proof beyond a reasonable doubt. Meaning what? <u>That proof to a degree of moral certainty</u>. Meaning what? That the 12 of you good people, the jury will be reduced from 14 to 12 by the clerk, 12 of

> you good people invoke and calling upon your good God given common sense and basically weight and evaluate, recreate the evidence, you are going to ask yourselves are we satisfied, how? To a degree of moral certainty not beyond an absolute doubt that the accused did commit the crime, or the crimes of which he stands accused before us. That's your issue, that's your job, that's what you're here for today. It is not my job, it's not any of the judges' job.

(Emphasis added.)

Reduced to its basics, this charge told the jurors that proof beyond a reasonable doubt meant that the defendant's guilt had to be proven not merely by conjecture or guesswork but to "a degree of moral certainty." Less than certainty was sufficient, the jurors were told, because "it's impossible in our society to prove anybody guilty of a crime beyond all doubt."

We think this instruction created a significant risk that the jurors could

find guilt based on a threshold of proof below that required by the Constitution. The primary problem, as recognized by the district court, was the use of the phrase "to a degree of moral certainty." The judge's instruction essentially told the jurors that they needed some undefined amount of -- "a degree of" -- moral certainty to find petitioner guilty. The Massachusetts Appeals Court did not comment on the trial judge's addition of the words "a degree of" to the moral certainty concept. We do not believe those words may be overlooked. Semantically, it is as if an instruction in a tort case informed the jury that "a degree of due care" was all that was required of the defendant to avoid liability. In this case, where an individual's guilt or innocence is at stake, the not so subtle difference

represented by the words "to a degree of" is of even greater importance.[4/]

Although the use of this language on its own may not always be constitutional

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4/ The significance of using the phrase "a degree of moral certainty" rather than a "moral certainty" when discussing the state of certitude necessary for finding guilt seems even greater when that language is contrasted with the language from Webster, where the Supreme Judicial Court did not use the moral certainty concept in isolation but linked it with other terms emphasizing the high degree of proof needed. For example, the SJC referred to an "abiding conviction, to a moral certainty," and to evidence establishing proof to "a reasonable and moral certainty."

We repeatedly have criticized the practice of defining reasonable doubt in terms of "moral certainty," although we have not found use of the phrase to be constitutional error. See, e.g., United States v. Drake, 673 F.2d 15, 21 (1st Cir. 1982); United States v. Indorato, 628 F.2d 711, 720-21 (1st Cir. 1980); United States v. Ariza-Ibarra, 605 F.2d 1216, 1228 (1st Cir. 1979). While the context of the Webster charge lessens the potential for any harmful inferences to be drawn by the jury, the use of the phrase "to a degree of moral certainty," particularly without the Webster context, is substantially more problematic.

error, its harmful effect was given full sweep in the present context. What was said, and not said, in other parts of the charge was likely to exacerbate, rather than ameliorate, the troubling aspects of the "to a degree of moral certainty" language. First, in otherwise defining the reasonable doubt standard, the judge added little dimension to the "degree of moral certainty" description. He said only that guesswork was not enough, and that absolute certainty would be too much to require -- leaving "a very broad range." District Court Opinion at 5. The instruction failed to convey the critical point that, while ~~absolute~~ certainty is unnecessary, a belief in guilt at least approaching absolute certainty was required. In addition, although the judge explained why absolute certainty would be too much to

require, he never discussed why it was important to require a very high standard of proof. Thus, the jurors may well have been left with an impression that any amount of persuasion -- i.e., anything beyond guesswork or conjecture -- properly could constitute sufficient "moral certainty" to support a guilty verdict.[5/]

Second, the judge's lengthy discussion of the civil standard of proof at the preface of his reasonable

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5/ At oral argument, the Commonwealth offered another plausible construction for the phrase "to a degree of moral certainty." Counsel suggested that the judge had intended to convey not that the level of certitude was some degree of moral certainty but that the "degree" of certainty was moral certainty. In other words, counsel construed the judge as possibly saying that the jurors need not be absolutely sure of their judgment but only morally sure. Although this meaning is conceivable, there is a substantial risk that the jurors understood the phrase to have the more harmful connotation, particularly in light of the remainder of the judge's charge.

doubt instruction was, as the district court noted, "confused and confusing." Nowhere did the instruction actually contrast the level of proof required for the government to meet its burden in a criminal case with the level of proof needed by a civil plaintiff, except to say that, in the criminal case, the standard was proof beyond a reasonable doubt rather than a preponderance of the evidence.

Third, the words of the instruction at some points defied comprehension. The judge referred to "a degree of moral certainty not beyond an absolute doubt" -- a preplexing combination of concepts. What does it mean to have an "absolute doubt?" Can one have an "absolute" doubt and still be morally certain?

Finally, and particularly harmful, was the judge's description early in his

charge of the jury's role:

> [B]oth sides put in their factual picture and it's up to you, it's not up to me, not up to any other judge, and not up to any lawyer, and not up to anybody else, but solely and exclusively up to you, jurors to determine where the ring of truth, integrity, honesty abides. That's your job. . . .

This instruction -- suggesting that the jury's task is to figure out which side is "right" rather than to determine whether the government proved guilt beyond a reasonable doubt -- would increase the jury's tendency to undervalue the reasonable doubt standard. The instruction allowed the jurors to believe that it was sufficient if they found the government's version of events to be more plausible than the defendant's; they could have believed that the "degree of moral certainty; they needed was simply certainty that the government's evidence was more believable than the defendant's.

Although a judge need not define reasonable doubt,[6/] any definition given must not reduce the government's burden of proof. United States v. Olmstead, 832 F.2d 642, 645-46 (1st Cir. 1987). In this case, the judge's attempted explanation could well have had the effect of minimizing the burden. The phrase "to a degree of moral certainty" was the only affirmative definition of reasonable doubt offered. To the extent the jurors gave meaning to that phrase based on the remainder of the judge's instructions, their inclination could have been to give the government the benefit of the "doubt."

6/ We note that the Massachusetts Appeals Court has held that it is error, under state law, for a trial judge to fail to give an instruction on the meaning of reasonable doubt. Commonwealth v. Stellberger, 25 Mass. App. Ct. 148, 149 (1987).

In sum, the entire thrust of the reasonable doubt charge was to de-emphasize the strength of what is supposed to be a very strong standard, potentially depriving petitioner of perhaps his most important protection against an improper verdict. See Dunn v. Perrin, 570 F.2d 21, 25 (1st Cir. 1978) (discussion of the right to proof beyond a reasonable doubt is "perhaps the most important aspect of the closing instruction to the jury in a criminal trial"). We therefore conclude that the charge as given in this case rose to the level of constitutional error.7/

7/ The Commonwealth argues that our standard of review in this case is circumscribed because we are reviewing a state criminal proceeding rather than a federal case. We agree that, in this situation, the question is "not merely whether 'the instruction is undesirable, erroneous[,] or even universally condemned,'" Smith v. Bordenkircher, 718 F.2d 1273, 1276 (4th Cir. 1983) (quoting Cupp v. Naughten, 414 U.S. 141, 146

(footnote continued)

IV.

A finding of constitutional error, however, does not end this case. The Commonwealth argues that the error must be deemed harmless because the evidence against petitioner is overwhelming. Petitioner responds that failure to instruct the jury properly on the reasonable doubt standard can never be harmless because the right to trial by jury includes the right to have the jury

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(footnote continued)

(1973)), but "whether the challenged aspects of the charge so infected the entire charge and trial as to cause the jury to evaluate petitioner's guilt or innocence under a standard less than 'beyond a reasonable doubt,'" Bumpus v. Gunter, 635 F.2d 907, 909 (1st Cir. 1980).

Our conclusion, however, is that the challenged instructions did so infect the entire charge and trial. We also note that "the fact that a constitutional right is implicated permits reference to federal precedents for the determination . . . of whether a violation occurred . . . ." Dunn v. Perrin, 570 F.2d 21, 25 n.7 (1st Cir. 1978).

decide whether the Commonwealth proved its case beyond a reasonable doubt.

We previously have declined to hold that a constitutionally defective instruction on reasonable doubt could never be deemed harmless, although we noted that "if such a case can be conceived, it would have to contain unique circumstances . . . .," Bumpus v. Gunter, 635 F.2d 907, 909 (1st Cir. 1980) (citing Dunn v. Perrin, 570 F.2d 21, 25 (1st Cir. 1978) (leaving to "another day" decision whether constitutionally defective charge on reasonable doubt can ever be harmless)). We continue to have serious doubts whether a conviction obtained without a proper reasonable doubt instruction could ever be upheld; we are certain that this is not the unusual case in which to do so. We draw this conclusion from Supreme Court precedent

and from our understanding of the role played by the jury in the criminal trial process.

The Supreme Court has substantially expanded the harmless-error rule that it pronounced in Chapman v. California, 386 U.S. 18 (1967), extending the principle to a wide variety of constitutional errors. See, e.g., Rose v. Clark, 106 S. Ct. 3101 (1986) (improper instruction on malice); Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986) (failure to permit cross-examination on witness bias); Rushen v. Spain, 464 U.S. 114, 117-119 (1983) (per curiam) (ex parte communication between trial judge and juror); United States v. Hasting, 461 U.S. 499, 509 (1983) (improper comment on defendant's failure to testify); Milton v. Wainwright, 407 U.S. 371, 377-78 (1972) (admission of confession obtained in violation of right to

counsel). Indeed, in Rose, the Court indicated that it is the rare case in which harmless error analysis is not appropriate: "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis." 106 S. Ct. at 3106-07.

Despite this broad statement, we understand the Court in Rose to imply that another error that might well trigger automatic reversal of a conviction is the absence of a proper reasonable doubt instruction. In footnote eight of that opinion, the Court contrasted an instruction that erroneously establishes a presumption in favor of the government -- such as the malice instruction at issue in Rose -- from an instruction that "'prevent[s] a

jury from considering an issue.'" The Court seemed to suggest that the former may be subject to harmless-error analysis while the latter should not be. In support of this proposition, the Court specifically cited to Jackson v. Virginia, 443 U.S. 307 n.14 (1979), in which it had indicated in dictum that the failure to instruct a jury on the reasonable doubt standard cannot be harmless. See also United Brotherhood of Carpenters and Joiners of America v. United States, 330 U.S. 395, 410 (1947) ("[W]here the evidence against an accused charged with a crime is well-nigh conclusive and the court fails to give the reasonable-doubt instruction . . . [i]t could not be said that the failure was harmless error.")

In addition, the Court's more general discussion about the kinds of errors that require automatic reversal

suggests that a faulty reasonable doubt charge normally should be included within that category. The Court stated that harmless-error doctrine is inapplicable to those errors that "render a trial fundamentally unfair," 106 S. Ct. at 3106. It gave as examples introduction of a coerced confession, complete denial of right to counsel, and adjudication by a biased judge. The Court then added that "harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury . . . 'regardless of how overwhelmingly the evidence may point in that direction.'" Id. at 3106 (citing United States v. Martin Linen Supply Co., 430 U.S. 564, 573 (1977)).

For us to affirm petitioner's conviction despite the defective reasonable doubt charge -- on the ground

that we believe the evidence proves guilt beyond a reasonable doubt -- would be to do the qualitative equivalent of directing a verdict for the prosecution. A reviewing court does not necessarily usurp the jury's role when it reviews the evidence to determine whether there is incontrovertible proof of one element of the crime, as the Supreme Court required of the Court of Appeals in Rose. But to say -- without the benefit of the sights and sounds that can affect credibility determinations -- that the sum total of what was presented adds up to proof of guilt beyond a reasonable doubt is to do the task assigned in our criminal justice system to a jury of the defendant's peers. See Martin Linen Supply Co., 430 U.S. at 572 ("[I]n a jury trial the primary finders of fact are the jurors. Their overriding

responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction.")

We reserve this task for the jurors not because they are more capable than judges of reaching a mathematically precise conclusion about guilt or innocence, but because they bring a fresh and impartial perspective to the criminal justice system. "The purpose of a jury is . . . to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." Taylor v. Louisiana, 419 U.S. 522, 530 (1975). We tolerate even quixotic verdicts, and allow juries "to err upon the side of mercy," Jackson v. Virginia, 443 U.S. 307, 317 n.10

(1979). See id. ("[T]he factfinder in a criminal case has traditionally been permitted to enter an unassailable but unreasonable verdict of 'not guilty.'"). See also Duncan v. Louisiana, 391 U.S. 145, 157 (1968) ("[W]hen juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed."). Although it may not be fundamentally unfair for judges to decide that the evidence in a given case demonstrates guilty beyond a reasonable doubt, it is certainly inconsistent with the concept of trial by a jury of one's peers.[8/]

8/ In Commonwealth v. Garcia, 379 Mass. 422, 442, 399 N.E.2d 460, 472-73 (1980), the Massachusetts Supreme Judicial Court held that an error in the reasonable doubt charge was harmless in light of

(footnote continued)

It is arguable that there will be some case in which the evidence is so compelling that no reasonable person possibly could reach a verdict of innocence. Perhaps this would be so if the government introduces a voluntary confession that is not challenged at trial by the defendant, who for some reason declined to plead guilty (though we express no opinion on this matter). But in this instance, where the Commonwealth's case rested substantially

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(footnote continued)

the "overwhelming evidence of guilt." Garcia presents no unusual circumstances suggesting that the harmless error doctrine might have been appropriate in that situation, and we therefore disagree with the SJC's conclusion. We reiterate that federal law, not state law, governs our determination of matters relating to federal constitutional violations. See supra note 7. See also Garcia, 379 Mass. at 445-46 (dissenting opinion of Liacos, J.) (disagreeing that an erroneous charge on reasonable doubt can constitute harmless error).

on the credibility of the alleged victim,[9/] we cannot say that the errors in the reasonable doubt instruction were harmless beyond a reasonable doubt.

The judgment of the district court is therefore affirmed.

9/ Although the testimony of the victim, Neil Hirons, was detailed and substantiated in certain particulars by other witnesses, petitioner did not testify and the jurors therefore heard only the victim's account of the origins of the conflict between the two men.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 86-3128-S

THOMAS LANIGAN, *
Petitioner, *
*
v. *
*
MICHAEL T. MALONEY, *
Respondent *

MEMORANDUM AND ORDER ON PETITIONER'S MOTION FOR SUMMARY JUDGMENT

January 26, 1988

SKINNER, D.J.

In this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, the petitioner, Thomas J. Lanigan, has moved for summary judgment.

Petitioner was convicted in Superior Court, Worcester County, of armed robbery, assault with intent to murder, assault and battery with a dangerous weapon, and kidnapping. The Massachusetts Appeals Court reversed th

convictions for assault and battery with a dangerous weapon and assault with intent to murder, on account of deficiencies in the jury instructions. The convictions for armed robbery and kidnapping were affirmed. Commonwealth v. Lanigan, 12 Mass. App. Ct. 913, 423 N.E.2d 800 (1981).

Petitioner bases this habeas corpus petition on a claim that the trial judge's instructions on reasonable doubt were constitutionally defective. Petitioner had specifically requested reasonable doubt instructions in the language of Commonwealth v. Webster, 5 Cush. 295, 320 (1850). After the judge gave a different charge, petitioner objected. He later challenged the instructions on appeal.

The judge's instructions on reasonable doubt included a comparison to the burden of proof in a civil case.

After explaining the preponderance of the evidence standard, he said:

> Now, I come to the Criminal side of the Court, that's what were on today the Criminal side of the Court. This young man is accused of four crimes and he stands accused, indicted, he is charged with four crimes. The burden here is not to prove his guilt by a fair preponderance of the believable evidence, tilting the scales slightly in his favor. The burden here, Mr. Foreman and ladies and gentlemen of this jury is to prove his guilt beyond a reasonable doubt. On the Criminal side of the Court, which this is, a criminal, one who is charged with a crime I should say, not a criminal -- who is charged with a crime -- his guilt must be established beyond a realm of speculation, guess work, surmise. That sort of thing must be established how? Beyond a reasonable doubt. Meaning what? Meaning beyond all doubt? Never, because it is impossible in our society to prove anybody guilty of a crime beyond all doubt. That would be too lofty a standard, it would be unattainable. But the standard is proof beyond a reasonable doubt. Meaning what? That the 12 of you good people invoke and calling upon your good God given common sense and basically weight and evaluate, recreate the evidence, you are going to ask yourselves are we satisfied, how? To a degree of moral certainty not beyond an absolute doubt that the accused did commit the crime, or the crimes of which he

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> stands accused before us. That's your job, that's what your here for today. It is not my job, it's not any of the judges job.

Trial Transcript at 191-92.

The Appeals Court considered the constitutionality of the charge on reasonable doubt and concluded: "We think the charge passed muster in this respect, although the question is close." Commonwealth v. Lanigan, 12 Mass. App. Ct. at 914-15, 423 N.E.2d at 802. The rescript opinion suggests that the court approved of the phrase "moral certainty," without noting that the trial judge defined proof beyond a reasonable doubt as proof "to a degree of moral certainty."

Petitioner challenges the instructions on three grounds. He argues first, that the judge contrasted reasonable doubt with a preponderance of the evidence in a confusing and erroneous

manner. Second, he claims that the charge was unbalanced because the judge twice said that the standard was not beyond "all doubt," or beyond an "absolute doubt" because such a standard would be "too lofty," and "unattainable," but did not give a countervailing instruction on the dangers of too weak a standard. Finally, petitioner challenges the use of the phrase "to a degree of moral certainty" as a definition of proof beyond a reasonable doubt.

A person may not be constitutionally convicted of a crime except by proof beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). A discussion of the concept is "perhaps the most important aspect of the closing instruction to the jury in a criminal trial." Dunn v. Perrin, 570 F.2d 21, 25 (1st Cir.), cert. den'd, 437 U.S. 910 (1978). While a judge need not define

the term "reasonable doubt," if he or she chooses to do so, the definition must not reduce the burden of proof on the government or expand the degree of permissible doubt. United States v. Olmstead, 832 F.2d 642, 645-46 (1st Cir. 1987). Before overturning a conviction resulting from a state trial, however, a court must be satisfied not merely that the challenged instruction was "undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." Cupp v. Naughten, 414 U.S. 141, 146 (1973).

In this context, the trial judge's use of the phrase "to a degree of moral certainty" is unacceptable. Our court of appeals has repeatedly discouraged the practice of defining reasonable doubt in terms of "moral certainty." United

States v. Drake, 673 F.2d 15, 21 (1st Cir. 1982); United States v. Indorato, 628 F.2d 711 (1st Cir.), cert. den'd, 449 U.S. 1016 (1980); United States v. Ariza-Ibarra, 605 F.2d 1216, 1228 (1st Cir. 1979). It has not, however, found it to be of constitutional significance: "While we discourage the 'moral certainty' phraseology, we do regard its use as reaching the level of legal or constitution error." United States v. Indorato, 628 F.2d at 721.

The use of the phrase "to a degree of moral certainty" is a more serious error. It implies that something less than complete moral certainty is sufficient. Thus, the jury in this case could have been left with an impression that any amount of moral certainty is sufficient to support a guilty verdict.

The rest of the charge failed to clarify, and in fact may have further

obscured, the standard. The jurors knew only that "reasonable doubt" was less than "absolute doubt" and more than "speculation, guess work, surmise," -- an extremely broad range. Furthermore, the judge's comparison to the preponderance of the evidence standard was confused and confusing. The judge's depiction, at the start of his charge, of the trial as a competition could have further exacerbated the situation:

> [B]oth sides put in their factual picture and it's up to you, it's not up to me, not up to any other judge, and not up to any lawyer, and not up to anybody else, but solely and exclusively up to you, jurors to determine where the ring of truth, integrity, honesty abides. That's your job . . . .

Trial Transcript at 187. The jury's job is not to determine the "truth," as the judge said, but to determine whether the government has proved its case beyond a reasonable doubt.

While the use of the phrase "to a degree of moral certainty" may not necessarily be a constitutional error in every case, in this case it was presented to the jury twice, and, more importantly, it was the only affirmative definition of reasonable doubt offered. It is not a technical error appearing in "artificial isolation." Dunn v. Perrin, 570 F.2d at 25 (citing Cupp v. Naughten, 414 U.S. 141, 147 (1973)). Indeed, other portions of the judge's charge may have served to confuse the jurors further. This case is distinguishable from First Circuit cases in which the court criticized the use of "to a moral certainty," but determined that the charge, taken as a whole, adequately apprised the jury of the requirement of proof beyond a reasonable doubt. See, e.g., United States v. Drake, 673 F.2d at 21; United States v.

Indorato, 628 F.2d at 711; United States v. Ariza-Ibarra, 605 F.2d at 1228. This jury was never adequately apprised of the proper standard.

In my opinion, there is a significant possibility that the jurors in this case entered the jury room with no clear sense of what degree of certainty was required in order to convict the defendant. The effect of the charge was to "obfuscate one of the 'essentials of due process and fair treatment.'" Dunn v. Perrin, 570 F.2d at 25. The error committed by the trial judge was not harmless. Rose v. Clark, ___ U.S. ___, 106 S.Ct. 3101, 3107 n.8 (1986); Jackson v. Virginia, 443 U.S. 307, 320 n.14 (1979). The charge was therefore constitutionally infirm.

Petitioner's motion for summary judgment is ALLOWED. The writ of habeas corpus shall issue unless, within 90 days

from the date of this order, the state has reinstituted proceedings to retry the petitioner.

[/S/ Walter Jay Skinner]
United States District Judge

Commonwealth v. Thomas Lanigan. July 21, 1981. The defendant was convicted of armed robbery, assault with intent to murder, assault and battery with a dangerous weapon, and kidnapping on the basis of testimony by the victim that he had been waylaid by the defendant and a companion, forced into an apartment at knifepoint, robbed, cut with a knife, stripped, tied with an electrical cord, and stabbed several times during a fight before he made his escape. A police officer took him to a hospital. Another officer, acting on the victim's description, went to the apartment, found blood in the hall and on the door, gained entrance through the manager, and found neither the defendant nor his companion within. The police then padlocked the apartment and returned at an unspecified

later time to search the apartment without a warrant. They found and seized several items which tended to corroborate the victim's story. These were introduced in evidence over the defendant's objection.

The evidence on the motion to suppress was such that the judge could properly find that the defendant had no legitimate expectation of privacy that was violated by the search of the apartment and the seizure of the incriminating items because he had previously abandoned the apartment. See generally Abel v. United States, 362 U.S. 217, 241 (1960); Feguer v. United States, 302 F.2d 214, 248-250 (8th Cir.), cert. denied, 371 U.S. 872 (1962); Parman v. United States, 399 F.2d 559, 564-565 (D.C. Cir.), cert. denied, 393 U.S. 858 (1968). The original entry was lawful, as was the padlocking of the apartment.

The police were justified in trying to apprehend the defendant and his companion without delay and to prevent the destruction of evidence at the scene of the several crimes. The only question of arguable impropriety arose from their reentry without a warrant. See Mincey v. Arizona, 437 U.S. 385, 392-394 (1978). Prior to that time the defendant had returned to the building, found the apartment padlocked, learned from the manager that it had been locked by the police, and left the building not to return, traveling (apparently the same day) to Arizona. There was no evidence as to how long the defendant stayed in Arizona, but another pretrial motion filed by the defendant indicates that he did not return to Massachusetts for many months. The apartment had been rented for a two-week period, and, while the evidence did not indicate precisely when

the two-week period expired, the defendant testified that he had lived in the apartment for about two weeks. From this evidence the judge could properly infer that the defendant, immediately on learning that the police were investigating him, fled from the Commonwealth with the intention of not returning to the apartment during the short period, if any, which remained of his rental period. It is clear from the cases on the subject that abandonment can be found to have taken place before the end of the rental period (Feguer v. United States, 302 F.2d at 249; United States v. Wilson, 472 F.2d 901, 902-903 [9th Cir. 1972], cert. denied, 414 U.S. 868 (1973); United States v. Hunter, 647 F.2d 566, 568 [5th Cir. 1981]; State v. Chiles, 226 Kan. 140, 147 [1979], the essence of abandonment being the act of leaving coupled with the intention of not

returning (Abel v. United States, 362 U.S. at 241; Friedman v. United States, 347 F.2d 697, 704 [8th Cir.], cert. denied, 382 U.S. 946 [1965]; United States v. Colbert, 474 F.2d 174, 176 [5th Cir. 1973]). A relinquishment of rights by abandonment does not depend on knowledge by the police that the abandonment has occurred. Feguer v. United States, 302 F.2d at 250; Parman v. United States, 399 F.2d at 564-565; State v. LeDuc, 48 N.C. App. 227, 241 n.1 (1980). It is not, in our view, relevant that the abandonment may have been induced by the defendant's fear of apprehension upon seeing that the police had entered and secured the apartment, so long as the entry and securing of the apartment were themselves lawful. Compare Commonwealth v. Battle, 1 Mass. App. Ct. 579, 582-583 & n.7 (1973), S.C.,

365 Mass. 472 (1974); Commonwealth v. Fox, 3 Mass. App. Ct. 123, 125 (1975).

Although the judge failed to make findings, it seems clear that he found an abandonment, that having been the Commonwealth's principal argument at the close of the hearing on the motion to suppress. No purpose would be served by requiring express findings at this late date. There was no conflicting testimony to resolve. The source of all the facts bearing on abandonment was the defendant's own testimony on the motion to suppress, and the abandonment seems an almost inescapable conclusion if his testimony is credited.

The judge, in his charge, differentiated between the preponderance-of-the-evidence test applicable to civil cases and the proof-beyond-a-reasonable-doubt test applicable to criminal cases, emphasized twice that the latter test

required that the jury be satisfied of the defendant's guilt to a moral certainty, and cautioned against speculation, guesswork, or surmise. We think that the charge passed muster in this respect, although the question is close. We emphasize, as has the Supreme Judicial Court (Commonwealth v. Therrien, 371 Mass. 203, 208-209 [1976]; Commonwealth v. Wood, 380 Mass. 545, 551 [1980]), that improvision is generally not desirable in defining the concept of reasonable doubt and that reliance is better put on the time-tested language of Commonwealth v. Webster, 5 Cush. 295, 320 (1850).

The defendant's contentions with respect to other objections raised at the trial have been considered and are without merit. Although no appropriate objection was taken at trial, the panel are of the opinion that the judge's

charge with respect to the indictments for assualt and battery with a dangerous weapon and assault with intent to murder was so deficient that there exists a likelihood of a miscarriage of justice if those convictions are allowed to stand. See Commonwealth v. Freeman, 352 Mass. 556, 563-564 (1967). Accordingly, the judgments on indictment nos. 90642 (assault and battery by means of a dangerous weapon) and 90643 (assault with intent to murder) are reversed, and the verdicts thereon are set aside. The judgments on indictment nos. 90641 (armed robbery) and 90644 (kidnapping are affirmed.

So ordered.

Stephen Gordon for the defendant.
Paul F. Bolton, Assistant District Attorney, for the Commonwealth.